BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended;

AND IN THE MATTER OF the complaint by Patricia Musty dated July 21, 1995 and addendum dated November 27, 1995, alleging discrimination and harassment with respect to employment on the basis of sex and reprisal.

B E T W E E N :

Ontario Human Rights Commission

- and -

Patricia Musty

Complainant

- and -

Meridian Magnesium Products Limited
Ed Waters, Paul Walker, Ron Doan and Willi Kammerer

Respondents

- and -

Attorney General for Ontario

Intervener

INTERIM DECISION

Adjudicator : Mary Anne McKellar

Date : December 17, 1998

Board File No: BI-0140-97

Decision No : 98-020-I

Board of Inquiry (*Human Rights Code*)
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APPEARANCES

Ontario Human Rights Commission	)	Roger Palacio, Counsel Brian Eyolfson, Counsel
Patricia Musty, Complainant	)	Harry Kopyto, Agent
Meridian Magnesium Products Limited, Corporate Respondent Ed Waters, Personal Respondent Paul Walker, Personal Respondent Ron Doan, Personal Respondent Willi Kammerer, Personal Respondent	)	Barbara Humphrey, Counsel
Attorney General for Ontario, Intervener	)	Sarah Kraicer, Counsel

INTRODUCTION

In this decision I determine whether to reconsider a portion of the Interim Decision released February 13, 1998, and whether to allow the Complainant to amend her Complaint. Additionally, I provide some directions with respect to the case management of the outstanding issues for adjudication.

DECISION

I refuse the requests to reconsider and to amend the Complaint.

BACKGROUND

Pursuant to s. 35(6) of the *Human Rights Code*, R.S.O. 1990, c. H-19, as amended ("the *Code*"), I was assigned to hear the complaints of Patricia Musty ("the Complainant") that, contrary to the *Code*, Meridian Magnesium Products Limited, Ed Waters, Paul Walker, Ron Doan and Willi Kammerer ("the Respondents") discriminated against her on the basis of sex ("the Original Complaint"), and subsequently took reprisal against her in respect of her raising the Original Complaint ("the Reprisal Complaint"). The Respondents have conceded that the Original Complaint discloses a contravention of the *Code*, for which an award of damages is appropriate, including an award of $10,000.00 in respect of damages for mental distress.

At the outset of the hearing, the parties identified several matters that they wished to have dealt with by way of preliminary motion. These were:

(1) a motion by the Complainant to amend the Complaint;

(2) a motion by the Respondents and the Commission challenging the Board's jurisdiction to entertain the constitutional question raised by the Complainant in respect of the Original Complaint; and

(3) a motion by the Respondents seeking to have the Board define the scope of evidence relevant to the Original Complaint.

On November 6, 1997, I commenced hearing evidence on the motion referred to in Paragraph (1) above. The hearing was adjourned until January 7, 1998 to enable the Complainant to provide the other parties and the Board with copies of the documents on which she intended to rely. At the same time, the hearing of the motion with respect to my jurisdiction to entertain the constitutional question was scheduled for January 8, 1998. The Attorney-General for Ontario subsequently indicated an intention to speak to this motion.

At the outset of the hearing on January 7, 1998, an issue arose with respect to whether the Complainant and her agent ought to be permitted to make tape recordings of the proceedings using small hand-held tape recorders. The other parties submitted that I ought to preclude them from doing so and expressed concern about the purposes to which such recordings might be put. Upon being assured by the Complainant and her counsel that the recordings were intended as an *aide-memoire* to supplement their handwritten notes, I ruled that:

- the Complainant and her agent could make the tape recordings;
- I was considering them bound by the undertaking of her agent with respect to the purposes to which those recordings would be put;
- I was directing everyone else present in the hearing room to abide by the same restrictions as to use with respect to any recordings they might make or that might come into their possession;
- any breach of this undertaking or my direction could be enforced through proceedings for contempt; and
- any other party who wished to do so could make a recording of the proceedings subject to the same restrictions.

Evidence and submissions in respect of the Motion to Amend could not be completed on January 7, 1998. I issued the following oral ruling refusing the Complainant's request to adjourn the motion scheduled for the following day in order to allow for the completion of the hearing on the Motion to Amend:

> We will proceed with hearing the preliminary motion respecting this Board's jurisdiction to entertain the constitutional question tomorrow at 9:30 a.m.
>
> While it is unfortunate that Ms Musty's cross-examination must be interrupted for this purpose, on balance I find that this is the most fair and expeditious manner of proceeding, having regard to the following:
>
> - The Commission could not reasonably have anticipated that Johanna Gibson rather than Chris McKinnon could provide the most cogent testimony with respect to the circumstances surrounding the finalization of the initial complaint, having regard to the statements of the Complainant's agent at the last day of hearing.
> - It would be unfair to require the Commission to complete its cross-examination of Ms Musty without having had an opportunity to interview Ms Gibson.
> - It is probable that Ms Gibson could not be located, interviewed by Mr. Palacio [Commission counsel], and possibly, travel to Toronto in time for tomorrow's hearing, such that Ms Musty's cross-examination would likely be interrupted in any event.
> - The outcome of the jurisdictional motion may well have a significant impact on whether or not, or to what extent, the motion to amend the complaint is pursued.

On January 8, 1998, I heard the motion challenging the Board's jurisdiction to entertain the constitutional challenge. The Attorney General for Ontario appeared on that motion and took the position that the Board was without jurisdiction. My Interim Decision with reasons was issued on February 13, 1998. The pertinent parts of it read:

> While the Board of Inquiry does have jurisdiction to entertain the Constitutional Question, the Ontario Court (General Division) is a more appropriate forum for its resolution. In my discretion, I am staying the hearing on the Constitutional Question to permit the Complainant to proceed before the more appropriate forum.
>
> Should the Complainant decide to make application to the Ontario Court (General Division) with respect to the Constitutional Question, she is directed to advise the Board of Inquiry and the other parties of her decision within thirty days of the release of the Board's reasons on these jurisdictional motions.

The Complainant wrote to the Board on February 26, 1998, seeking to have extended the above time limits, and seeking to have reconsidered that portion of the decision in which I determined on discretionary grounds to defer to the Court. I issued a further Interim Decision on March 12, 1998, directing the parties to turn their minds to various outstanding case management issues that I intended to have them address before me via teleconference. With respect to the request for reconsideration, the March 12, 1998 decision specified:

> All parties should be prepared to address: whether the Board has jurisdiction to reconsider, having regard to sections 21.2 and 25.1 of the *Statutory Powers Procedure Act,* R.S.O. 1990, c. S.22, as amended, and the Board's own *Rules of Practice*; whether grounds for reconsideration exist; and what the outcome of any reconsideration should be. The Attorney General for Ontario may participate in this aspect of the conference call.

The Deputy Registrar of the Tribunals' Office engaged in correspondence with the parties in an attempt to schedule a case-management teleconference before the Board, and continuation dates for the outstanding motions, both in accordance with the March 12, 1998 Interim Decision. When she failed to obtain written agreement from the parties on mutually convenient dates, she eventually convened her own teleconference, during which May 21 and 26, 1998 were set for the continuation of the Motion to Amend. In the meantime, the Respondents had provided the Board and the other parties with written submissions opposing the Complainant's request for

reconsideration. One of the matters the Deputy Registrar addressed with the parties at her conference call on April 24, 1998 was whether the parties consented to having the Board determine the reconsideration on the basis of written submissions. My understanding, and that of the Respondents and the Commission, as subsequently indicated by their respective counsels, was that all parties had agreed to do so in accordance with the timeframes set out in a letter dated April 15, 1998 from the Deputy Registrar.

The Board did subsequently receive written submissions on the reconsideration question from all the parties. The Complainant's submissions, and those of the Attorney General for Ontario, dealt with only the first two issues outlined in the March 12, 1998 Interim Decision: they failed to address what the outcome of any reconsideration should be.

The Attorney General for Ontario did not attend the hearing on May 21, 1998. I indicated to the parties present that, in accordance with the Interim Decision of March 12, 1998, and their consent to having the matter dealt with in writing, I would be deciding all aspects of the reconsideration request on the basis of the written submissions. At this point, the Complainant's agent indicated that he had not consented to all aspects of the reconsideration request being dealt with in writing. Although they had not earlier appreciated this to be his position, the Commission and the Respondents consented to having me decide on the basis of the written submissions only whether the Board had jurisdiction to reconsider and whether grounds for reconsideration existed. Should the answers to those questions be affirmative, another day of hearing would be convened for the purposes of my entertaining the parties' submissions on whether I ought to have exercised my discretion to defer the constitutional challenge to the Court.

The parties present on May 21, 1998 also consented to an order extending the time specified in the February 13, 1998 Interim Decision for the Complainant to advise the Board and the parties whether she intended to make application to the Ontario Court in respect of the constitutional

question. Having regard to the parties' submissions, I hereby extend that time limit to 60 days from the date of release of this decision.

Evidence and argument in respect of the Motion to Amend were finally completed on May 21 and 26, 1998.

REQUEST FOR RECONSIDERATION

The Board's jurisdiction to reconsider

The Complainant's submissions in support of its request for reconsideration are set out in its letter dated May 15, 1998:

> I wish to emphasize that I initially requested that the Board of Inquiry reconsider its position on the decision to defer since the issue before the Board of Inquiry at the time that I made my submissions was whether it had the jurisdiction to hear the constitutional question. The arguments that were presented at the inquiry were solely with respect to the issue of whether it had the jurisdiction to hear the constitutional question. The issue of deferring the matter to the courts was not a subject matter addressed at that time, was not raised by anyone and therefore was not dealt with. I now simply request an opportunity to present arguments on the deferral issue and ask the Panel to permit an opportunity to make submissions on this point notwithstanding the fact that it appears to have been decided already.

Notwithstanding the direction in the March 12, 1998 decision, the above submissions do not address the issue of whether the Board has jurisdiction to reconsider its decision to defer consideration of the constitutional question to the courts. Both the Respondents and the Commission take the position that the Board has no such jurisdiction. The Attorney General for Ontario takes no position on whether the Board has such jurisdiction.

Unlike the enabling legislation of some other statutorily created quasi-judicial bodies (e.g. the Ontario Labour Relations Board ("OLRB") or the Pay Equity Hearings Tribunal ("PEHT")), the *Code* does not confer upon the Board the authority to reconsider its final decisions. The *Statutory Powers Procedure Act*, which applies to the Board, does contain provisions respecting the authority of agencies under its purview to reconsider their decisions. The Commission and the Respondents in their submissions referred to s. 21.2(1) of the *SPPA*, however, they cited predecessor language to the current provision, which was amended in S.O. 1997, c.23. Section 21.2(1) provides:

> A tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order.

Section 25.1 merely provides that a tribunal "may make rules governing the practice and procedure before it".

Taken together, sections 21.1(1) and 25.1 confer on a tribunal the authority to reconsider its decisions in circumstances where it has promulgated rules providing for reconsideration. The Board of Inquiry has promulgated *Rules of Practice*, but those *Rules* do not contemplate the Board's dealing with reconsideration requests. Therefore the prerequisite to the Board's exercise of such authority does not exist.

I find that the Board is without jurisdiction to reconsider its decision to defer consideration of the constitutional question to the Ontario Court (General Division).

Do grounds for reconsideration exist?

In the event that I am incorrect in my conclusion above, and the Board does indeed have jurisdiction to reconsider its decision to defer, my view is that grounds for reconsideration do not exist.

In her submissions, counsel for the Respondents referred to decisions of the PEHT and the OLRB as setting out the circumstances in which reconsideration may be granted. The OLRB has held that it

> . . . will not normally accede to a request to reconsider unless the party requesting reconsideration intends to adduce new evidence which was previously unavailable to them by the exercise of due diligence, and then only where such additional evidence, if proved, would be likely to make a substantial difference to the outcome of the case. Reconsideration is therefore generally restricted to allow a party to adduce evidence or make representations which it did not have a previous opportunity to raise. The Board may also consider such factors as the motives for the request for reconsideration in light of a party's conduct, and the resulting prejudice to another party if the case is reopened. *(K-Mart Canada Limited (Peterborough)*, [1981] O.L.R.B. Rep. Feb. 185, at p. 185)

The above quotation was cited with approval by the PEHT in *Women's College Hospital (No.2)* (1990), 1 P.E.R. 178, at Para. 14, a decision in which the panel went on to enumerate the factors to be considered in determining whether to reconsider:

> (i) Was there evidence at the time of the hearing that was not presented because it was unavailable to the party asking for reconsideration, and which is likely to make a substantial difference to the outcome of the case?
> (ii) Since the decision, has there been a change in circumstances such that the decision should not stand?
> (iii) Is the decision wrong in law?

The Commission, the Respondents, and the Attorney General for Ontario all take the position that grounds for reconsideration do not exist in the circumstances of this case because the question addressed by the Board was one of law only. They further submit that the Board properly exercised its jurisdiction in deferring the constitutional question to the Ontario Court (General Division). In the submissions of the Attorney General for Ontario:

> The only issue in dispute is one of law. The question of whether the Board or a court ought to determine the constitutional issue was fully argued by all parties

> before the Board. The appropriate forum for reviewing the legal issue of whether the Board erred in deferring the constitutional issue to the court is the Divisional Court.

No witnesses testified at the hearing that resulted in the February 13, 1998 Interim Decision. The documentary evidence before the Board consisted exclusively of the complaints, the pleadings and the Complainant's Notice of Constitutional Question. The Complainant does not now assert that there is **evidence** she might have adduced, did not have the opportunity to adduce, and which would have substantially altered the outcome of the motion. She does, however, assert that she was denied the opportunity to make **representations** on whether the Board ought to defer. The alleged error in what the Board did, as I understand it, is not that it exercised a jurisdiction it did not have, but that it acted unfairly in not asking the parties specifically to address whether it ought to defer.

At the outset of the motion, there were two possible outcomes: either the Board would entertain the constitutional question, or it would find that the Court must do so. Nothing the Board did in exercising its discretion to defer altered the scope of those outcomes in any way. It merely decided on a basis different than that argued by the parties that the Court must decide the question. The situation is analogous to one in which the applicant before a tribunal leads evidence and makes submissions to support an allegation that the respondent has contravened a certain statutory prohibition, but where the tribunal instead concludes on the basis of the same evidence and submissions that a different statutory prohibition has been contravened. In such circumstances, the tribunal is not precluded from making that finding, and it is not obliged to seek further representations from the parties on the applicability of that ground of relief. See *R. v. Ontario Labour Relations Board, Ex. P. Lakehead Registered Nursing Assistants Bargaining Association*, [1969] 2 O.R. 597 (H.C.J.):

> I am of the opinion that there was nothing to prevent the Board from dealing with the question of the application of s. 45a simply because no direct application for such purpose was made by an employee. On the face of it, if s. 45a applies, the Board may make a declaration under s-s. (1) of that section. . . . If it can be done

> upon such an application, the Board cannot be prevented from dealing with such a question simply because it arises in the course of an application brought, not for that purpose, but for some other purpose, e.g. certification as here. (*per* Osler, J., at p. 601)

Here the parties made representations about the nature of the case before the Board, and about the adjudicative attributes of the Board. Although they did so in support of their respective submissions on the issue of the Board's jurisdiction to entertain the constitutional question, those same considerations are the very ones relied on by the Board in its determination of whether to exercise its discretion to defer the matter.

I find that there are no grounds for reconsidering the decision to defer the Constitutional Question. Consequently, there is no need to convene a further hearing to allow the parties to make submissions on what the outcome of any reconsideration should be.

MOTION TO AMEND

Background

Neither the parties' positions on the Motion to Amend nor the scope of the outstanding issues to be adjudicated can be appreciated without some background to the Original Complaint and extensive reference to the pleadings and motions materials filed.

The Internal Investigation

The documents filed in support of the Motion to Amend include two in which the Complainant raised with the Respondent Kammerer the issue of her treatment in the workplace (October 14, 1993) and the existence of a more generalized work environment that was poisonous to women (January 28, 1994). Following the commencement of her medical leave in November, 1994, these matters were raised formally with her employer, apparently through a letter from the Complainant's counsel dated December 7, 1994. Present counsel for the Respondents was

retained to conduct an investigation into these allegations. Her written report issued on January 13, 1995.

The investigation dealt both with whether there was a poisoned work environment generally and whether the Complainant was treated differently and dismissively on the basis of her gender. With respect to the second issue, the report included an examination of three specific incidents, two of which seem to be referred to in the Original Complaint and at greater length in the proposed amendments. The investigator concluded both that the work environment was poisoned, and that the Complainant as an individual had been treated differently because of her gender. The report contained recommendations that the Corporate Respondent undertake certain "policy, educational and reinforcement initiatives to address the environment", as well as recommendations with respect to rectifying the behaviour of the Personal Respondents, Waters and Walker. The report also enumerated a number of items that should be jointly considered and agreed upon between the employer and the Complainant in coordinating her return to work.

Following the issuance of the report of the internal investigation, counsel for the Respondents and counsel for the Complainant exchanged correspondence with respect to the report and the implementation of its recommendations, including some correspondence respecting the conditions under which she would be prepared to return to work. No agreement was ever reached on these matters. Two of the stumbling blocks appeared to be the amount of money to be paid to the Complainant, and the appropriateness of the disciplinary measures recommended with respect to the Respondents Waters and Walker.

The Original Complaint

Contemporaneously with her formal written complaint to her employer in December, 1994, the Complainant contacted the Commission. The Complainant testified that she initially made telephone inquiries of the Commission. Her first letter to the Commission, dated December 12,

1994, requests that her complaint of verbal and visual sexual harassment be investigated. Following the completion of file intake and the drafting of her complaint, the Complainant executed the Original Complaint on July 21, 1995. The Commission proceeded to investigate it, and the subsequent amendment of it on November 27, 1995 to include allegations of reprisal. I heard a great deal of testimony about the communications that occurred between the Commission and the Complainant between late 1994 and the execution of the Original Complaint. My findings with respect to that evidence are set out in a subsequent part of these reasons.

The Original Complaint comprises ten short paragraphs. The first paragraph alleges that the Corporate Respondent employed the Complainant in the position of Coordinator of Safety and Training Programs from November 1992 to November 1994, and that she was subject to verbal and visual sexual harassment. The second paragraph enumerates the nature of the visually offensive material. Succeeding paragraphs recount incidents of alleged verbal harassment, including the names of those involved, and the times when the incidents are alleged to have occurred. The Personal Respondents are all identified either as having engaged in the harassing behaviour, or as having failed to respond appropriately when the Complainant reported the harassment to them. The Original Complaint also alleges that the harassment caused stress to the Complainant and resulted in her commencing a medical leave on November 1, 1994.

The Original Complaint does not contain any remedial requests.

After the Original Complaint was referred to the Board, the Commission and Complainant filed their Statements of Facts and Issues in Dispute, including the remedies requested, and the Respondents served and filed their Response.

The Commission's Statements of Facts and Issues

The Commission filed its Statement of Facts and Issues on September 23, 1997. In this document, it sets out the ways in which it alleges that the workplace was poisoned for women generally, and the ways in which it alleges that the Complainant in particular was discriminated against because of her gender. In recognition of the fact, however, that the internal investigation report had already found these allegations to be made out, the Commission articulated the issues in dispute on the hearing as being two: whether reprisal occurred; and what remedies were appropriate. On the Original Complaint, then, the Commission's position is that the only issue is one of appropriate remedy. The remedies requested by the Commission are set out as follows in its statement of Facts and Issues:

1. Remedies to make the Complainant whole:

A) Reinstatement to her position reporting to the President of the corporate respondent and without interacting in any way with any of the individual respondents.

B) Appropriate compensation under the following heads of damages:
   1. Specific damages for lost wages and other out-of-pocket expense;
   2. General damages for injury to the complainant's dignity and deprivation of her right to equal treatment without discrimination, harassment and reprisal;
   3. Damages for mental anguish;

C) Letter of apology from all respondents containing a retraction of all negative references to her work performance and providing assurance against future reprisal. Removal of any negative work performance evaluation from her personnel file.

D) Reasonable time off for continuance of psychotherapy, provided that medical evidence of the need for continuing psychotherapy is provided on a periodic confidential basis to the corporate respondent by the complainant's physician.

2. Remedies to meet the public interest:
   A) A letter of assurance to the Commission containing a confirmation of all initiatives undertaken to remedy the poisoned work environment and the respondents' commitment to zero tolerance of harassment and discrimination based on sex and other grounds prohibited by the *Code*.

B) The posting of Code Cards and of the zero tolerance workplace anti-harassment and anti-discrimination policy in prominent locations at the plant's premises.

C) The Health & Safety Committee of the corporate respondent be given the mandate of identifying and resolving workplace harassment and discrimination issues. The Committee shall keep records of complaints of harassment and/or discrimination received and the actions taken and provide the Commission with copies thereof each quarter for a three year period.

D) The human rights orientation of new employees and the workforce training on sexual harassment and discrimination not be handled by any of the individual respondents. Instead, the corporate respondent will hire an external human rights specialist to conduct such training.

E) Commission monitoring of the workplace with access to company and employee records each quarter for the next three years. The Commission monitoring will include a written report filed by the corporate respondent with the Commission each quarter for the next three years. The report will contain the information set out in paragraph 2(c), above, as well as the names, address [sic] and telephone numbers of any female employee who leaves the employ of the corporate respondent or who go [sic] on leave therefrom.

3. Such other relief as the Commission or the complainant may claim and the Board of Inquiry considers appropriate.

The Complainant's Statement of Facts and Issues

At the same time that she served and filed her Statement of Facts and Issues on September 29, 1997, the Complainant also served and filed her Notice of Motion to amend the Original Complaint. Her Statement of Facts and Issues contains some eight paragraphs of factual allegations, one of them dealing exclusively with the issue of reprisal. In the opening paragraph of the Statement of Facts and Issues, she adopts as her material factual allegations those set out in the Proposed Amended Complaint. The Complainant identified the following as the outstanding issues requiring resolution by the Board.

The following issues will arise upon the hearing of this complaint:

a. was the complainant subjected to sexual harassment and gender discrimination?

b. was the aforesaid conduct pervasive and ongoing over a significant period of time?
c. was senior management aware of the poisonous work environment caused by such conduct and, in fact, did they encourage and/or participate in it?
d. if it was aware, did it take any steps in order to rectify the environment and conduct complained of?
e. if it did not take such steps, was the decision not to take such remedial action reckless and wilful;
f. was senior management made aware of the conditions and conduct as set forth in the amended complaint?
g. did the conduct complained of cause the complainant to become ill?
h. what are the pecuniary losses sustained by the complainant?
i. what are the non-pecuniary losses sustained by the complainant?
j. is this an appropriate case to order reinstatement?
k. have measures been taken to rectify the situation complained of since it was implemented, and if so, have such measures been effective?
l. if such measures have not been effective, what appropriate remedies are available to the Board to ensure that the conduct complained of is not repeated?
m. is this an appropriate case for the Board to consider systemic measures in order to rectify the conduct complained of and if so, does the Board have jurisdiction to so do?
n. is the statutory limit contained in section 41 of the Human Rights Code constitutional and consistent with sections 7 and 15 of the Canadian Charter of Rights and Freedoms?

The Complainant's specific remedial requests were contained in her proposed amended complaint.

Proposed Amended Complaint

The Proposed Amended Complaint comprises 22 paragraphs, some of them quite lengthy. They do not contain any assertions of new grounds on which the Complainant seeks relief under the *Code*. To put it colloquially, her complaint remains that she was treated badly by the Respondents in the course of her employment because she was a woman, and that she was exposed to visual material and verbal remarks that degraded women. Some of the amendments sought provide additional examples of incidents the Complainant claims constitute harassment, and some provide further details with respect to examples already set out in the Original Complaint. Other amendments chronicle her frustrated efforts to secure cooperation and compliance with various

health and safety initiatives. Many of the amendments read like a "will-say" statement of what the Complainant's testimony in support of the allegations will be, including hearsay statements of comments others made to her. For example, Paragraph 12 reads, in part:

> Joanne Root and I went up to the front office for coffee and were discussing the harassment that she has been subjected to for a number of years by Mr. Walker. Mr. Ron Doan joined in on our conversation as did Mr. David Hansen, Joanne Root's immediate supervisor. Mr. Ron Doan did nothing to limit this harassment even though he was Mr. Walker's boss, but rather chose to ignore it and went to lunch. Joanne went to lunch; however, David Hansen and I carried on the conversation concerning this sexual harassment. David Hansen commented that he agreed that this harassment should not be allowed to continue and that if he was Paul's boss, he would fire him. I told him that, as one of the directors of the company, he should address the issue of ongoing sexual harassment by Paul Walker at the next management meeting later in the week.

Again, in Paragraph 18, the Complainant makes an assertion with respect to what motivated two of the Personal Respondents to behave as they did:

> Mr. Walker and Mr. Waters resented any changes and resisted implementation of the safety programs because, at least in part, they were prepared by a woman.

This is obviously a statement she does not have the testimonial capacity to make, although I appreciate that she could ask me to infer from the incidents that occurred what prompted Walker and Waters to act as they did.

Paragraph 18 illustrates what is clearly a theme of the Proposed Amended Complaint, to articulate the connection that the Complainant perceives between her treatment by the Respondents, and the position she occupied, which (again speaking colloquially) seemed to be to act as a sort of occupational health and safety watchdog. Her agent stated in argument that the Complainant's position was that she was treated badly by the Respondents because she was a woman performing

a job that was non-traditional for a woman. His concern was that he not be precluded from eliciting evidence from which I might conclude that this was so.

In her Proposed Amended Complaint, the Complainant requested a number of remedies. I set them out as they appear in that document:

(a) reinstatement in her employment with full benefits from November 1994 until her return to work with the Respondent subject to the conditions outlined below, and in particular, subject to the formation of a committee, composed of equal representatives from employees and management, with authority to investigate and adjudicate on similar complaints to that of the Applicant including a committee which would create reporting levels and which would be able to exercise the power to set forth a disciplinary code for similar future infractions of the Health and Safety Act and the Ontario Human Rights Code up to and including termination, and incorporating the principles of progressive discipline. Alternately, the Applicant asks that this Board declare that the existing Joint Health and Safety Committee has such authority and power to exercise such jurisdiction described in the sentences above. There shall be broad grounds of appeal of any decision made by the committee;

(1) The Applicant requires a personal letter of apology from Paul Walker, Ed Waters and Willi Kammerer be sent to all current and former female employees of Meridian Magnesium Products limited.,

(2) The Applicant requires a letter from Robert Lander, the President of the company, acknowledging and validating the Applicant's complaints of sexual harassment, discrimination on the basis of sex and poisoned work environment. The letter should address the steps taken to redress these complaints and further acknowledge Meridian's commitment to honoring the Human Rights Code in the future.

(3) A letter retracting any statement with respect to alleged performance issues against the Applicant. Further, the investigation report of Barbara Humphrey's [sic] is to be reissued with these comments expunged from same.

(4) A letter of recommendation from Willi Kammerer fairly outlining our client's job performance while at MERIDIAN MAGNESIUM PRODUCTS LIMITED., the contents of which are to be agreed upon by the applicant and the corporate respondent.

(5) A change in status so that the Applicant reports directly to the President of Meridian Magnesium Products Limited.

(6) The Applicant requires a written contract of employment terminable by Meridian only on the basis of just cause or when the applicant attains the age of sixty-five years or when Meridian ceases to exist. The contract shall provide for regular salary increases.

(7) The Applicant requires that the Ontario Human Rights Code be posted in a prominent location in the plant.

(8) The Applicant requires reimbursement of the following out of pocket expenses:
   (i) All legal fees, para-legal fees and disbursements
   (ii) Costs for Psychiatric and Doctor's reports
   (iii) Hospital parking costs

(9) The Applicant is to have time off work as of right for her continuing psychotherapy.

(10) The Applicant requires detailed information on what disciplinary action [sic] have been taken against Paul Walker and Ed Waters.

(b) an Order for damages for income, loss of promotion opportunities and other pecuniary losses incurred as a result of her unlawful constructive dismissal;

(c) an Order for damages for mental anguish, prejudice to her future employment opportunities and other nonpecuniary losses caused by the gender discrimination to which the Applicant was subjected and also caused by her constructive dismissal;

(d) an Order for interest on the amounts requested pursuant to subclauses (b) and (c) above;

(e) such further and other relief as counsel for the Applicant may advise and this Board may deem appropriate to grant;

(f) payment of all fees, time and materials to reinstate Accredited Safety Auditor certificate;

(g) all missed payments under the companies [sic] bonus and gain sharing plans;

(h) an Order for damages for the Applicant's spouse;

(i) an Order for damages for each of the Applicants [sic] five (5) children

(j) an Order for damages for the Applicant's parents.

(k) The Applicant requires that The Board of Directors of Meridian Technologies will revise the Corporate Health and Safety Policy. The revised policy is to include a statement that employees are entitled to work in an environment free of harassment where they are treated with respect and dignity. The Board is to report their revisions to shareholders and employees within four (4) months after the decision of this Board of Inquiry has been released. Furthermore, the Board is to ensure that senior management of each subsidiary company prepared [sic] and reviews annually a written Harassment Policy and develops an [sic] maintains a program to implement that policy. Such policy is to be signed by senior management and posted in a conspicuous location in the workplace.

The Response

In their Response, the Respondents disputed some of the factual allegations asserted by the Commission and by the Complainant, but nevertheless conceded that they had contravened the *Code* in respect of the allegations contained in the Original Complaint. As had the Commission, the Respondents took the position that there were two outstanding issues before the Board: was the Complainant subject to reprisal; and what was the appropriate remedy? The Respondents further submitted that they were prepared to provide certain remedies. I set them out as they appear in the Response (including bolding).

1. Remedies to Make the Complainant Whole:

The Respondent is prepared to provide the following remedies to the Complainant to make the Complainant whole:

a) The Complainant's position has continuously been left available for her to return to since November 1994 to the present. To the present date, the Complainant has refused to consider a return to the workplace. It is the Respondent's position that the Complainant can be returned to her former position of Coordinator of Safety and Training Programs with a dual reporting relationship to the following individuals:
   - Leonard Miller – General Manager
   - Bonnie Twyford – Manager of Human Resources

   (*Note: Both of these individuals arrived at the MPL Strathroy facility post the Complainant's complaint)*

b) **Compensation Under the Following Heads of Damages**

1. **Special Damages** pursuant to Section 41(1)(a) of the Code – lost wages and out-of-pocket expenses

   Specifically:

   1) A payment to the Complainant representing the difference between her regular salary and any monies received *(i.e. STD benefits, salary continuation benefit, UIC, any other income)* between the period of November 1, 1994 through to January 1, 1996 *(the point at which the Complainant was fit to return to work).*

   2) Any payments under the Respondent's gain sharing plan that accrued in connection with the period from November 1, 1994 through to January 1, 1996.

   3) Reimbursement of out-of-pocket expenses of hospital parking and doctor's reports provided that supporting documentation and receipts are submitted.

2. **General damages** for mental anguish pursuant to Section 41(1)(b) of the Code in the amount of **$10,000.00.**

c) **(i) Letter of Apology from the Individual Respondents who engaged in the inappropriate conduct representing harassment and discrimination (letters from P. Walker and Ed Waters).**

(ii) Letter of assurance from the Corporate Respondent with respect to providing the Complainant with a work environment free from discrimination, harassment and reprisal.

(Note: There are no negative work performance evaluations on the personnel file of the Complainant)

d) Reasonable time off for continuance of psychotherapy provided that medical evidence of the need for continuing psychotherapy is provided on a periodic confidential basis to the Corporate Respondent by the Complainant's physician.

2. Remedies to Meet the Public Interest

a) **A letter of assurance to the Commission** containing a confirmation of all initiatives undertaken to remedy the poisoned work environment and the Respondent's commitment to zero tolerance of harassment and discrimination based on grounds prohibited by the Code.

b) **Posting of the code cards** and of the **Corporate Respondent's workplace harassment and discrimination policy** in prominent locations at the Respondent's premises.

c) **The Health and Safety Committee** at the Respondent Company to be given a **formal role in workplace harassment and discrimination prevention.** Specifically, that role would be in connection with being involved in identification and resolution of issues and potential issues. How?: The designation of one non-managerial employee and one management Health and Safety Committee Representative as advisors with respect to workplace harassment or discrimination issues.

- The provision of relevant training to such individuals by an outside consultant to support them in developing the relevant knowledge and skills for early detection, investigation and resolution.

- The communication to the entire workforce of the role of the Health and Safety representatives as advisors.

d) **Commission monitoring of the workplace.** Respondent's proposal:

- The Corporate Respondent will provide the Commission for a period of two years with the following:

i) A quarterly written report outlining a summary of:

A) any workplace harassment issues or potential issues raised and resolved through the advisory resolution support *(specifying the issue and resolution).*

B) any formal complaints filed, together with a summary of the finding of the investigation and any remedial initiatives arising out of such investigations.

ii) Provision of the names and telephone numbers of any female employees who leave the Company or go on leave.

Any other initiatives identified by the Board of Inquiry, appropriately directed at addressing public policy issues or the workplace environment that are within the Board's jurisdiction.

The Parties' Positions

At the outset of the hearing on November 6, 1997, I asked all parties to outline briefly their positions on the various motions. Mr. Palacio, who was Commission counsel at that point, indicated that the Commission opposed the Motion to Amend, because the Complainant had had ample time previously to review the complaint drafted by the Commission and to seek any changes to it. This turned out to be an unfortunate statement that unnecessarily derailed and prolonged these proceedings.

The Complainant's agent in his opening statement asserted that, contrary to the Commission's statement: (1) the Complainant had not been provided meaningful input into the drafting of her complaint; (2) it did not contain all the allegations it should have; and (3) that when she sought to have it changed she had been told to sign it as it was or it would be abandoned. Since these assertions amounted to evidence, they could not be adduced through the Complainant's agent, but required her *viva voce* testimony, as well as that of the Commission employee she identified as having been involved in the drafting of her complaint. This, in turn, necessitated an adjournment so that documents could be photocopied and arrangements made for the attendance of the Commission witness, and then later for the attendance of a second Commission witness when some uncertainty developed about which of the two had made the alleged "sign or the complaint will be dropped" statements to the Complainant.

In the end, none of the above appears to have been necessary, since the Commission (now represented by Mr. Eyolfson) in final argument did not strongly pursue the point that the amendments should be denied because the Complainant failed to assert them earlier. Instead, the Commission relied on legal (as opposed to equitable) grounds for opposing them: some were simply not necessary because they did not ground new claims for relief and all the information

contained in them could properly be adduced in support of the Original Complaint, while others referred to matters never brought to the attention of the Commission and investigated.

Counsel for the Respondents took no part in the factual dispute respecting whether the Complainant had an earlier opportunity to amend the Complaint. Instead, she indicated at the outset that she opposed the Motion to Amend. In final argument, her position was similar to that of the Commission. She did submit, however, that evidence relevant to the incidents recounted in her report but not referred to in the Original Complaint or the proposed amendments could potentially be adduced, subject of course to her outstanding motion to limit the scope of evidence to matters pertaining to the issue of remedy only.

The Testimony

I do not find credible the Complainant's assertions that she was coerced into signing the Original Complaint and that it did not contain all the allegations she had specified. My reasons for so concluding are set out below.

First, I note that the information she supplied to the Commission during the intake phase of its handling of her Complaint largely finds its way into the Complaint she signed. Her correspondence with the Commission throughout the intake phase stresses those aspects of her complaint relating to the visual and verbal aspects of the poisoned work environment. She does not mention the issue of being individually discriminated against because of her sex.

Second, the Complainant claimed in her testimony that the draft complaint was sent to her only a few days before the return deadline of July 31, 1995. In fact, she must have received it on or before July 21, 1995, since that is the date she executed it.

Third, the covering letter sent by the Commission with the draft complaint, contrary to the Complainant's assertions, does not say that the complaint will be dropped if not executed and returned by July 31, 1995: it merely says it will not be continued if it is not signed and returned. Furthermore, that letter expressly invited her to make whatever changes she felt were necessary to the complaint. The Complainant took advantage of that opportunity and wrote in the names of two additional respondents. This amendment is consistent with the documentation that exists respecting her desire for amendments. She wanted additional respondents added, and that happened. She wanted to assert a reprisal claim, and that too happened with the amendment of November 27, 1995. There is no documentary trail to indicate that she ever communicated to Commission personnel any other dissatisfaction with the scope of her complaint. I feel confident, having reviewed the correspondence that the Complainant did generate, and having heard her testify, that she would not have shied away from contemporaneously communicating any such dissatisfaction.

Both Johanna Gibson and Chris McKinnon categorically denied ever having told the Complainant that her complaint could not be pursued unless she signed the Original Complaint as drafted by the Commission. Neither of them qualified their denials in any way during cross-examination. I have no reason to believe that they were not telling the truth and I prefer their evidence to that of the Complainant's, which, as noted above, was internally inconsistent on these matters.

Some of the proposed amendments refer to matters that are not specifically raised by the Complainant in any of the intake materials she provided. I cannot conclude from the failure to refer to them during written intake that the matters were not raised by her verbally either at that point or during the investigation. I was not provided with a complete case analysis or investigation file, nor did any investigating officer testify with respect to the scope of the investigation. That portion of the investigation file that was put before me related to the investigating officer's interview with the Complainant in January 1997. The notes of that meeting indicate that the Complainant raised with the Officer the subject of resistance to wearing hearing protection, an allegation that finds its way into Paragraph 9 of the Proposed Amended Complaint.

The Respondents called no witnesses.

Jurisprudence on Amendments

None of the cases cited by the Commission take issue with the proposition that the Board has the jurisdiction to amend a complaint that has been referred to it. See the following Board of Inquiry decisions: *Cousens v. Canadian Nurses Association* (1981), 2 C.H.R.R. D/365*; Wong v. Ottawa Board of Education (No. 1)* (1993), 23 C.H.R.R. D/32*; Wong v. Ottawa Board of Education (No. 2)* (1993), 23 C.H.R.R. D/37; *Wight v. Ontario* (1994), 25 C.H.R.R. D/169*; Reimer v. York Regional Police and Donald Kirk* (July 30, 1997) (unreported)*; Moffat v. Kinark Child and Family Services and Harry Oswin* (October 31, 1996) (unreported); *Pattison v. Fort Frances* (1987), 8 C.H.R.R. D/3884; *Joe v. University of Toronto (No.1)* (1995), 25 C.H.R.R. D/472*; Barnard v. Fort Frances Board of Police Commissioners* (1986), 7 C.H.R.R. D/3167; *Ouimette v. Lily Cups Ltd. (No.3)* (1990), 12 C.H.R.R. D/19*; Entrop v. Imperial Oil Ltd. (No.3)* (1994), 23 C.H.R.R. D/186; and *Entrop v. Imperial Oil Ltd. (No.5)* (1994), 23 C.H.R.R. D/191.

Those cases generally hold that the Board's jurisdiction to amend a complaint derives from s. 39(1) of the *Code* requiring it to hold a hearing "to determine whether **a right** of the complainant under this Act has been infringed" (emphasis added).

The Board has the jurisdiction to amend a complaint. That jurisdiction is exercised having regard to all of the circumstances. Whether to allow an amendment is thus a discretionary decision. In exercising this discretion, Boards have considered whether a proposed amendment, which often involves the assertion of a new ground of contravention, arises out of the same factual allegations as the original complaint, and whether raising it for the first time at the hearing would prejudice the respondents. So, for example, in *Wong (No.2)*, supra, where an amendment was allowed to add "age" as a ground of discrimination, the Board wrote (in Para. 7):

> . . . the complaint is that for grounds prohibited by the Code Mr. Wong was declared surplus to the needs of Ottawa Technical High School. The 'incidents' surrounding his having been declared surplus . . . which must be established through appropriate evidence will remain substantially unchanged regardless of the grounds alleged to have motivated that decision.

The same rationale prompted the Board in *Wight* to allow the complaint of discrimination on the basis of sex to be amended to include allegations of sexual harassment. See Para. 33 of that decision. The proposition that emerges is that complaints may be amended where the amendment does not expand the scope of the factual inquiry, but merely cites new grounds on which liability might be founded. The underlying principle behind the proposition is that there can be no prejudice or surprise to respondents in such circumstances.

Even where the amendment sought involves the introduction of new factual circumstances, Boards have nevertheless permitted them so long as there is no prejudice to respondents, there is no

violation of natural justice, and there is an opportunity to respond. See *Hollis Joe* (at Para. 102) and *Entrop (No. 5)* (at Paras. 26 and 27).

The Canadian Human Rights Tribunal has held that for amendments to be allowed they must be asserted at the earliest moment possible. See *Local 916, Energy and Chemical Workers v. Atomic Energy of Canada Ltd.* (1984), 5 C.H.R.R. D/2066, at Para. 17564. The Commission's first counsel, Mr. Palacio, may have been thinking of this case when he premised his opposition to the Complainant's Motion on her failure to raise her concerns earlier in the process. My reading of the totality of the cases cited to me suggests that the above decision is anomalous in finding that mere delay constitutes sufficient reason to deny an amendment. The Board's jurisprudence suggests that the crucial factor in determining whether to permit an amendment is the potential prejudicial impact of the proposed amendment on the respondent. See *Reimer* and *Hollis Joe*. Of course, a complainant who does not assert new factual allegations as early as possible runs the risk of having a Board preclude their later assertion if the respondent has in the meantime been prejudiced by the death or disappearance of witnesses or documents that pertain to the new allegations.

Still other Boards have held that amendments are not necessary where the matters to which they relate flow from the continuum of the original complaint. Thus, in a case that involved a complaint about dismissal from employment, it was not necessary to amend the complaint in order to raise matters relating to the respondent's treatment of the complainant during his reinstatement. See *Entrop (No.3)*.

Finally, I note the decision of the Nova Scotia Court of Appeal in *I.M.P. Group Ltd. v. Dillman* (1995), 24 C.H.R.R. D/329. Here the Board permitted a complaint of sexual harassment to be amended to include allegations of sex discrimination in respect of a job competition in which the

complainant was unsuccessful, where that competition occurred more than a year after the events recited in the original complaint. Additionally, the amendment was permitted at a hearing which the respondent employer chose not to attend. The Court took a dim view of the Board's dealing "with a matter which had never been referred to it" (at Para. 35), particularly in the absence of the respondent who had no notice that the amendment would be sought. The Court also noted that the original complaint and the amendment "were founded on different evidence in a different time frame" (at Para. 44).

Application of above principles to this case

Although the Respondents did not assert that they were prejudiced by the amendments, any such assertion would have to be supported by evidence of actual prejudice. Just as the Board in considering abuse of process motions ought not to presume prejudice from the mere fact of delay, neither should it presume prejudice here in the absence of evidence of actual prejudice. See *Ford Motor Co. of Canada v. Ontario (Human Rights Commission)* (1995), 24 C.H.R.R. D/464 (Gen. Div.) at Para. 16. The lack of prejudice would favour granting the motion, if the amendments sought were otherwise appropriate.

In this case, the Complainant does not seek to add new grounds of liability to her Original Complaint. Nor, for the most part, does she seek to assert new facts on which liability might be founded, although the Commission and Respondents characterized the Proposed Amended Complaint as doing just that. Instead, she primarily seeks to amplify the factual assertions already made, and indeed to plead evidence by which those assertions might be proven. The conceptual framework on which liability was posited in the Original Complaint remains the same: visual and verbal sexual harassment constituting a poisoned work environment and individual acts of

discrimination based on sex directed at her. The pleading of evidence is inappropriate, so that this consideration favours dismissing the motion.

I find that those portions of the amendments that the Commission and the Respondents characterized as involving new factual allegations that were not investigated by the Commission merely further particularize the kind of behaviour she was complaining about in the Original Complaint and which was investigated by Respondent counsel. I am reluctant to hold that each specific incident that is alleged to have contributed to a poisoned work environment or that constituted discrimination on the basis of sex needs to have been investigated by the Commission before evidence may be adduced in respect of it at a hearing. My understanding of the Commission's role during the investigation is that it is to determine whether sufficient evidence in support of a finding of a contravention of the *Code* exists so as to justify a recommendation that the Commissioners refer the matter to the Board. And, as already indicated, in the absence of most of the evidence relating to the scope of the investigation, I cannot conclude with certainty that these matters were not raised at that time. Commission and Respondent counsel assured me that they were not, while the Complainant's counsel submitted that these matters were dealt with in the case analysis. The fact is that the Complainant alleged her work environment was poisoned and she alleged she was discriminated against because of sex. Those general allegations were investigated by the Respondent's counsel and by the Commission's investigators. Unlike the Court in the *I.M.P. Group* case, I am not able to state that the proposed amendments are founded on "different evidence in a different time frame" as compared to the Original Complaint. The proposed amendments may be considered to form part of the continuum of the Original Complaint, such that an amendment is not necessary. This consideration favours dismissing the motion.

These amendments are sought in a case in which liability has already been conceded with respect to the allegations set out in the Original Complaint. The Commission and the Respondents share the view that the only outstanding issue with respect to the Original Complaint is the fashioning of an appropriate remedy. It is conceivable that the amendments might ground remedies different from or additional to those that would arise as a result of the liability conceded on the Original Complaint, although with two exceptions, I am not able to identify that any of the Complainant's requests for relief are uniquely referable to her Proposed Amended Complaint. Those two requests relate to seeking a letter of apology from the President of the Corporate Respondent, and seeking to have a joint committee struck to deal with violations of the *Code* and the *Occupational Health and Safety Act*, which committee could exercise the power to terminate employees. The first amounts to a request for an order against an individual who is not a party to these proceedings. The second seeks the creation of a committee to deal with disputes arising under a statute to which this Board is a stranger, and under which it has no jurisdiction. The Board's jurisdiction to grant these remedies is extremely dubious. This consideration favours dismissing the motion.

The Commission opposes the amendments. This fact makes this case unlike all the decisions cited to me. I find this is a significant difference. The Commission's view of the scope of the case is jurisdictionally significant because the Board derives its jurisdiction from the Commission's referral. The *I.M.P. Group* decision may be overly broad in its suggestion that a Board of Inquiry errs in amending a complaint to include a matter not referred to it. That rationale might preclude any number of amendments if the Commission's silence on a matter were taken to indicate that it did not intend to refer it. A Board might well be hesitant, however, to amend a complaint to include allegations that the Commission expressly declined to refer.

The Commission's opposition to the amendments is also significant because the *Code* gives the Commission carriage of the case. Does having carriage of the complaint mean that the Commission's voice trumps that of the Complainant wherever those two disagree on the nature of the question the Board is being asked to resolve? A similar issue has come before the Board in circumstances where the Commission has settled with the respondent, and a question has arisen as to whether the complainant may continue the complaint. In two recent decisions (*Shapiro v. Regional Municipality of Peel* (1997), 29 C.H.R.R. D/77 and *Tilberg v. McKenzie Forest Products Inc.*, (October 2, 1998) (unreported)) the Board has held that the Complainant may continue. The *Tilberg* decision was the subject of a judicial review application heard December 14, 1998. The Court reserved its decision.

In the absence of fuller argument on the significance of the Commission's opposition to the amendments, I am not prepared to conclude that a complaint can never be amended at the complainant's insistence where the Commission is opposed to the amendment. I nevertheless conclude that the Commission's opposition is a factor favouring dismissal of the motion.

The emphasis that the Complainant places on linking her treatment to the performance of work that is not traditionally performed by women is puzzling. As the excerpted portions of the Proposed Amended Complaint illustrate, this emphasis introduces allegations respecting motive. Complainants and the Commission usually take the position (and the Board's jurisprudence supports them) that a respondent's intention or motive is irrelevant to the issue of whether the *Code* has been contravened. The critical issue is not why respondents behaved as they did, but whether their behaviour amounted to treating a complainant differently from others on the basis of a prohibited ground. To the extent that the motive for her treatment could constitute a relevant issue, the Complainant could ask me to infer that motive on the basis of the evidence tendered to support the unamended Original Complaint. There is rarely any direct evidence of such motive

in any event, so that I would doubtless be forced to fall back on inferential findings. These considerations favour dismissing the motion.

In summary, after considering all of the above circumstances, I am dismissing the Motion to Amend.

OUTSTANDING ISSUES

In the Interim Decision of March 12, 1998, I asked the parties to address a number of outstanding issues:

a. Does the Employer concede a contravention of the *Code*? The Board's understanding is that it does.

b. Do the Complainant and Commission nevertheless propose to lead evidence to establish that a contravention has occurred?

c. Setting aside for the moment any challenge to the *Code*'s $10,000.00 cap on damages for mental anguish, do the Complainant and/or the Commission seek an amount of damages that is greater than what has been offered by the Respondents? If so, what is that amount?

d. If the Respondents' monetary offer is not acceptable to the Complainant and the Commission, do they propose to lead evidence to establish the damages claimed? What, if any, effect does the Respondents' offer have on the Board's jurisdiction in such circumstances? Can the Board award less than the Respondent has [sic] offered, or does the Respondents' offer function as a "floor" below which the Board cannot go?

e. Do the non-monetary remedies sought by the Complainant differ from those offered by the Respondents? The Board's understanding is that they do.

f. Are the non-monetary remedies sought by the Complainant also sought by the Commission? Are they remedies that the Complainant may pursue, or do they go beyond redressing the impact on her of the Respondents' contravention of the *Code*?

The Respondent answered question (a) affirmatively and has reiterated its position (also shared by the Commission) that the only issue remaining with respect to the Original Complaint is that of appropriate remedy.

For her part, the Complainant has answered question (b) affirmatively, stating her intention "to establish that multiple contraventions of the *Code* had occurred". At the close of his submissions on the Motion to Amend, however, the Complainant's agent indicated that "maybe no one will want to call evidence at all".

It is time that this issue was clarified once and for all. I am directing the Complainant to advise the other parties and this Board in writing of:

- the names of any witnesses she intends to call to establish that a contravention of the *Code* has occurred
- the nature of the matters about which each of those witnesses will be testifying.

The above information is to be communicated within 30 days of the release of this decision.

The fact that the Complainant may wish to lead evidence to establish that a contravention of the *Code* has occurred with respect to the Original Complaint is not determinative of whether this Board will entertain that evidence. It is not an appropriate use of scarce tribunal resources to hear evidence about matters that are not in dispute. If liability is conceded, then the appropriate remedy is the only remaining issue. Although the Respondents have served and filed a Notice of Motion seeking to confine the scope of appropriate evidence, I am not sure that it is necessary to hear it. It is axiomatic that the threshold for the admissibility of evidence is that it be relevant to an issue in dispute, which in this case is the appropriate remedy in respect of the Original Complaint. Subject to my comments in the second paragraph below, it may be difficult to determine in advance the nature of the evidence that will be relevant to that inquiry. The Respondents are directed to consider whether it would be preferable to have the scope of relevance

fleshed out in the hearing by way of objections if necessary, and to advise the other parties and the Board if they intend to proceed with their motion. Should they indicate an intention to proceed with that motion, I understand that they have requested that the hearing of it be postponed until such time as the Complainants have determined whether to pursue the Constitutional Question before the court. This request was not opposed by the Complainant or the Commission. It is a reasonable request and I grant it. Any motion by the Respondents will therefore not be returnable until at least 60 days after the release of this decision.

As for the questions I posed respecting the nature of the remedies requested, I have only two observations. The first is that the Respondents filed a copy of a settlement agreement that the Complainant was apparently prepared to enter into at some point. This document does not properly form part of the proceedings before the Board. It does not constitute a statement of desired remedy within the meaning of the Board's rules. The remedies that the Complainant seeks before me have been set out by her in the Proposed Amended Complaint. I have dismissed the Motion to Amend, so I am directing the Complainant to identify to the other parties and the Board within 30 days of the date of this decision which of those requests she intends to pursue as remedies for the Original Complaint.

I have already noted that the Board's jurisdiction to grant two of the remedial requests contained in the Proposed Amended Complaint is extremely dubious. Once the Complainant has indicated, pursuant to my direction in the preceding paragraph, which remedial requests she is pursuing, the parties are directed to make written submissions to me respecting the Board's jurisdiction to grant those requests. The Board's ruling on that issue should provide some further direction with respect to the scope of relevant evidence.

Although the Complainant is not bound to the remedial requests she made in the earlier settlement document referred to above, I cannot help but note that her remedial requests at that time, and indeed the non-monetary remedial requests now asserted by the Commission and the Complainant, appear to be largely satisfied by the Respondents' remedial offer. The Board of Inquiry offered

the parties the assistance of a mediator at the outset of this hearing. The Commission and the Respondents indicated an interest in having the matter mediated. The Complainant did not desire mediation. Since that time, the hearing of this matter has occupied five days; there have been several sets of written submissions; and three interim decisions have been issued. As noted above, there are still several outstanding matters to be dealt with, including possibly two more preliminary matters (respecting the scope of evidence and the Board's remedial jurisdiction), before any evidence is adduced relating to the appropriate remedy for the Original Complaint or whether the Reprisal Complaint is made out. In view of the considerable resources already devoted to this matter by the parties and the Board, the parties are directed to consider once again whether they would like to pursue a mediated resolution to the Original Complaint and/or the Reprisal Complaint and to advise the Board within 30 days of the release of this decision if they consent to having the matter mediated.

Dated at Toronto this 17th day of December 1998.

Mary Anne McKellar
Member, Board of Inquiry